Supreme Court, U.S.
FILED
AUG 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-728

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

C. L. CARR, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

PETITION FOR CERTIORARI

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ATTORNEYS FOR PETITIONER

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QUESTION PRESENTED

WHETHER PREJUDICE NEED BE SHOWN BEFORE AN INDICTMENT IS DISMISSED AND A CONVICTION REVERSED WHEN THE UNITED STATES ATTORNEY APPOINTS, WITHOUT STATUTORY AUTHORITY, A GRAND JURY "AGENT" TO INVESTIGATE AND PERSONALLY PRESENT EVIDENCE TO THE GRAND JURY?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. _____

C. L. CARR, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, C. L. Carr, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 7, 1985.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court for the Western District of Arkansas.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 7, 1985. A timely petition for rehearing was denied on July 2, 1985, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether prejudice need be shown before an indictment is dismissed and a conviction reversed when the United States Attorney appoints, without statutory authority, a grand jury

"agent" to investigate and personally present evidence to the grand jury?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Const., Amend V:

No person will be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury..., nor be deprived of life, liberty, or property, without due process of law....

F. R. Crim. P. 6:

Set out in full in appendix.

STATEMENT OF THE CASE

Petitioner C. L. Carr was the target of a grand jury investigation commencing on or about January 11, 1983. As a result of the grand jury investigation, an indictment was returned against petitioner and subsequently he was convicted in the United States

District Court for the Western District of Arkansas, for aiding and abetting the willful misapplication of bank funds in violation of 18 U.S.C. §§2 and 656. Jurisdiction in the District Court was proper pursuant to 18 U.S.C. §3231 and Rule 18 of the Federal Rules of Criminal Procedure.

At the grand jury proceedings, the United States Attorney, Asa Hutchinson appointed Gary Aaron, an agent of the Federal Bureau of Investigation, as agent of the grand jury. Mr. Aaron was to continue questioning the chief prosecution witness, Joel Tabor, and personally report his findings to the grand jury as an agent for the grand jury.

On February 29, 1984, Mr. Aaron did testify before the grand jury concerning the results of his interviews with Joel

Tabor. Thereafter, the grand jury issued the indictments against petitioner which led to his conviction.

At his trial, petitioner's counsel made an oral motion to dismiss the indictments on the grounds of prosecutorial misconduct and other grand jury improprieties. The motion was taken under submission and later denied.

After his conviction and sentencing, petitioner appealed to the United States Court of Appeals for the Eighth Circuit. Again, he raised the prosecutorial misconduct and other grand jury improprieties as grounds to dismiss the indictment and reverse the conviction.

In an opinion filed June 7, 1985, the Court of Appeals held that in order to dismiss the indictment and reverse the conviction, petitioner must first

show actual prejudice arising out of the appointment of the grand jury "agent." Since petitioner was unable to demonstrate actual prejudice, the court unheld the conviction.

Subsequently, petitioner filed a timely petition for rehearing with the Court of Appeals. This petition was denied on July 2, 1985.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICT'S WITH APPLICABLE DECISIONS OF THIS COURT.

Throughout its history, this Court has found certain instances in which a showing of actual prejudice was not a prerequisite to reversal of a conviction. See, e.g., Estes v. Texas, 381 U.S. 582 (1965); Turner v. Louisiana, 379 U.S. 466 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); In re Murchison, 349 U.S. 133 (1955); Tumey

v. Ohio, 273 U.S. 570 (1927). In these cases, the procedure under scrutiny involved such a probability that prejudice would result that it was held to be inherently lacking in due process.

One such case, Turner v. Louisiana, supra, merits further discussion. In Turner, the petitioner was convicted for a murder committed during the course of a robbery. During the three day trial, two deputy sheriffs who were the main prosecution witnesses also had custody of the jury. As a result, the deputy sheriffs maintained close and continuous contact with the jurors. This Court held that, under such circumstances, the petitioner need not demonstrate specific, isolatable prejudice before a reversal of his conviction was warranted. Justice Stewart stated that "... it would be blinking reality not to

recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two ke, witnesses for the prosecution." Turner, 379 U.S. at 473.

Petitioner in this case, C. L. Carr, acknowledges that Turner dealt with trial impropriety. He strongly contends, however, that the facts in Turner closely parallel those in his case, and that Turner's rule applies in this instance.

In the course of the grand jury proceedings concerning petitioner, the United States Attorney, without statutory authority, appointed an "agent" to assist the grand jury in its investigation. This "agent" was to continue the questioning of the government's chief witness and to report the information gathered directly to the grand jury

in the form of testimony. The "agent" did testify before the grand jury on February 29, 1984. Subsequently, the grand jury issued an indictment against the petitioner.

Both petitioner's case and Turner involve similar material facts. First, a relationship between jury and jury-witness was created. The Turner jury-witness relationship was created by way of personal contact and petitioner's jury-witness relationship was created by way of an agency. Second, the witness was a key prosecution witness. The Turner witness testified from personal, first-hand knowledge. The petitioner's witness testified from information gathered from the chief prosecution witness.

The same inherent prejudice found by this Court in Turner is endemic to

petitioner's case. The grand jury would assuredly place greater weight upon the testimony of their "agent" or, understandably, even accept absolutely any findings of their "agent."

Actually, greater prejudice redounds in petitioner's case than in Turner. In Turner, the resulting prejudice depended upon the chemistry between the witnesses and the jurors. The amount of personal contact between the witnesses and the jurors might have prejudiced the state's case. Not so in petitioner's case where the agency created acted to fuse the witness with the jurors.

The effect of the agency, coupled with the fact that the information the "agent" testified to came from the chief prosecution witness, leads to one inexorable conclusion: the petitioner

suffered grave prejudice at the grand jury proceedings. This prejudice acted to undermine the salutory function of the grand jury.

Once a prosecution witness became its agent, no longer did the grand jury stand between the accuser and the accused. It became the accuser, thereby denying petitioner his fifth amendment right not only to indictment by a grand jury, but also to due process of law. As Chief Justice Taft stated:

> [t]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man...which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Tumey v. Ohio, 273 U.S. 510, 532 (1927).

Not even the fact that Mr. Aaron was appointed the agent of a different grand jury from the one which returned the indictment against petitioner ameliorates the situation.

The reading of Mr. Aaron's appointment as grand jury "agent" planted the prejudicial seed in the second grand jury. His subsequent testimony brought the seed to fruition and tainted the indictment.

Had the Eighth Circuit properly applied the relevant precedents of this Court, the indictment against petitioner would have been dismissed and his conviction reversed. The appellate court's failure to utilize this Court's applicable decisions justifies the grant of certiorari to review the judgment below.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE BURDEN OF PROOF REQUIRED TO DISMISS AN INDICTMENT ON THE GROUNDS OF PROSECUTORIAL IRREGULARITY AT THE GRAND JURY PROCEEDINGS.

Rule 6 of the Federal Rules of Civil Procedure governs grand jury proceedings. Nowhere in its text does it provide for the appointment of a grand jury "agent." The appointment of a grand jury "agent" in petitioner's case without statutory authority, therefore, violates Rule 6 of the Federal Rules of Criminal Procedure.

No other federal appellate court has dealt exactly with the issue presented in petitioner's case. When faced with prosecutorial irregularity, however, the federal appellate courts have taken a stand regarding the burden of proof question.

The Fourth Circuit has addressed the question presented here in regard to unauthorized persons in the grand jury room. The Court held that a procedural violation of Rule 6(d) would require a dismissal of an indictment without a showing of prejudice by the accused. See United States v. Mechanik, 735 F. 2d 994 (4th Cir. 1984), reh'g on other grounds, 756 F. 2d 994 (4th Cir. 1985), cert. granted, Docket No. 84-1640 (June 17, 1985).

As in the above cited case, Rule 6 is unequivocal in its language. It provides no authority to appoint "agents" to the grand jury. Any such appointment violates the rule.

As stated by the Mechanik court, "[r]equiring a defendant to show prejudice would impose a difficult burden that could undermine the protection that

the rule provides." Mechanik, 735 F. 2d at 139. Indeed, secrecy constitutes the cornerstone of any grand jury proceeding. The only true way to measure the prejudicial effect of the appointment of an "agent" to the grand jury would be to poll the grand jury members, an unwise practice at best.

Requiring an individual to demonstrate actual prejudice arising from procedural irregularities gives federal prosecutors, in effect, a green light to abuse the grand jury process. Without access to the proceedings or persons composing the grand jury, establishing actual prejudice becomes a Herculean task.

Rather than allow the prosecutor to skirt the protection of Rule 6 with a bald assertion of "harmless error," require the government to prove that no

prejudice resulted from the procedural impropriety. Prosecutors clearly have greater access to such proof than the accused. Common sense and sound jurisprudence mandate this approach.

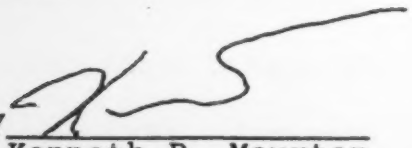
CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully

Submitted,

BALL, MOURTON &
ADAMS

By 

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ATTORNEYS FOR
PETITIONER

CERTIFICATE OF SERVICE

I, Kenneth R. Mourton, one of the attorneys of record for the Petitioner, C. L. Carr, state on oath that I have on this 29th day of August, 1985, served a copy of the above and foregoing Petition For a Writ of Certiorari upon the Respondent, by depositing a copy thereof in the U.S. Mail, postage prepaid, to Mr. Asa Hutchinson, P.O. Box 1524, Fort Smith, Arkansas 72902; and the Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530.

Kenneth R. Mourton

85-728

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OCTOBER TERM, 1985

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APPENDIX TO PETITION FOR CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2314

UNITED STATES OF AMERICA,	)	
APPELLEE,	)	Appeal from the United States
v.	)	District Court for the Western
C. L. CARR,	)	District of Arkansas
APPELLANT.	)	

Submitted: March 12, 1985

Filed: June 7, 1985

Before McMILLIAN and FAGG, Circuit Judges, and CAHILL,* District Judge.

McMILLIAN, Circuit Judge.

---

*The Honorable Clyde S. Cahill, United States District Judge for the Eastern District of Missouri, sitting by designation.

C. L. Carr appeals from a final judgment entered in the District Court[1] for the Western District of Arkansas upon a jury verdict finding him guilty of aiding and abetting the willful misapplication of bank funds in violation of 18 U.S.C. §§ 2 and 656. Appellant was sentenced to three months imprisonment and fined One Thousand and No/100 Dollars ($1,000.00). For reversal appellant argues that the District Court erred in (1) denying his motion to dismiss the indictment based on prosecutorial misconduct and grand jury improprieties and (2) denying his motion in limine or his motion for continuance to compel responses by the government. For the reasons discussed below, we affirm.

---

[1]The Honorable H. Franklin Waters, Chief Judge, United States District Court for the Western District of Arkansas.

Construing the evidence in the light most favorable to the jury verdict, the facts can be summarized as follows. Hamling v. United States, 418 U.S. 87 (1974). Appellant was an automobile and real estate investor and trader in Harrison, Arkansas. He often referred his customers to the First National Bank of Harrison (Bank) for financing. In particular, he referred his customers to Joel Tabor, a loan officer and vice-president of the Bank, who, from 1975 through 1980, approved automobile loans for people referred to the Bank by appellant. Approximately ninety-five percent (95%) of these loans went into default. These loans were unsecured because the titles to the automobiles were released to appellant at his request before the loans were fully paid. Later, to generate extra cash, appellant devised a scheme by which appellant would "sell" a piece of

his real property to "a buyer" who would sign a bank note. The proceeds of the bank loan on the real estate were given to appellant who promised to repay the debt. Tabor received kickbacks on some of these transactions.

Tabor was indicted and convicted of embezzlement. Following his conviction, Tabor agreed to testify on behalf of the government. On January 11, 1983, Tabor testified under a grant of immunity before a federal grand jury investigating illegal gambling activities in the Western District of Arkansas and embezzlement problems at the First National Bank of Harrison. Tabor testified, inter alia, concerning appellant's involvement in the embezzlement scheme at the Bank. At the conclusion of Tabor's testimony before the grand jury, the grand jury was given an opportunity to ask additional questions of Tabor. At that point the

following statement was made by the United States Attorney:

> Let me explain to you in front of the grand jury, . . . obviously we cannot cover in sufficient detail on these loans to enable us to do a proper investigation. I'm going to ask the grand jury to appoint Gary Aaron, a special agent of the FBI, as an agent of the grand jury, to continue . . . questioning you [Tabor] from time to time, as an agent of the grand jury and to report back . . . . [T]his information that you supply through Mr. Aaron will be included in the grant of immunity that has already been afforded to you.

The January 11, 1983, grand jury took no further action on this matter because the investigation was not completed until after the term of the grand jury had expired. In February 1984 the matter was presented to a new grand jury. An indictment against appellant was returned. Tabor's testimony to the previous grand jury was read in its entirety to the second grand jury. Other testimony given to the first grand jury

was also read to the second grand jury. FBI agent Gary Aaron testified as a witness before the second grand jury concerning his interviews with Tabor. The February 1984 grand jury returned an indictment against appellant who was subsequently convicted by a jury on July 10, 1984. It is from that conviction that appellant now appeals.

Appellant argues that the District Court erred in denying his motion to dismiss the indictment based on prosecutorial misconduct and grand jury improprieties. First, appellant argues that FBI agent Aaron was improperly appointed as a "special agent" of the grand jury. Appellant argues that this appointment blurs the traditional role of the grand jury acting as a body independent of the prosecution because agent Aaron served on behalf of the government as an investigator and on behalf of the grand jury as a

"special agent". The government argues that although the phrase "agent of the grand jury" was inappropriate and the District Court's concern about the word choice understandable, the District Court did not err in denying appellant's motion to dismiss the indictment because appellant failed to demonstrate that there was any prejudice resulting from the error. We agree with the government.

In United States v. Kilpatrick, 594 F.Supp. 1324, 1344 (D. Colo. 1985) (citations omitted), the District Court observed:

> [Fed. R. Crim. P. 6] does not authorize grand juries to have agents. The creation of that role and its misleading description to the grand jury is an improper intrusion into the exclusive and independent province of the grand jury by government attorneys and investigators. The most important function of the grand jury is to stand between the government agents and the suspect as an unbiased evaluator of the evidence . . . . The purpose of the grand jury requires that it remain free, within

> constitutional and statutory limits, to operate independently of either prosecuting attorney or judge.

However, a grand jury indictment will only be dismissed upon a showing of actual prejudice to the accused. United States v. McKenzie, 678 F.2d 629, 631 (5th Cir.), cert. denied, 459 U.S. 1038 (1982).

Although the District Court disapproved of the government's representation to the grand jury that agent Aaron would be sent to conduct further interviews with Tabor as an agent of the grand jury, the district court denied appellant's motion to dismiss the indictment because it found that appellant failed to demonstrate that he was prejudiced by the error. We agree with the District Court. In United States v. Kilpatrick, 594 F.Supp. at 1328, the prosecutors' conduct was much more egregious: "The prosecutors divined the office of 'grand jury

agent' by personally administering oaths before the grand jury to [three special internal revenue service agents]. The government concedes that the prosecutors possessed no authority to administer such oaths." Furthermore, the grand jury was constantly reminded of the agents' unique role and urged to rely on the IRS agents as their "agents". Id. at 1329.

In the present case there were two grand juries involved in handing down the indictment in the present case. Tabor personally testified before the first one. The first grand jury was informed that agent Aaron would act as its agent and supply further information from Tabor and other sources. Agent Aaron was not sworn in as an agent of the grand jury before either grand jury in the present case. The grand jury before which agent Aaron was improperly characterized as an agent never handed down an indictment

against appellant because the first grand jury's term ended before the investigation against appellant was completed. Approximately one year later, a second grand jury was read the transcripts of Tabor's and other first grand jury witnesses' testimony. Agent Aaron testified only as a witness before the second grand jury, not as an agent of the grand jury. Although the government's choice of words was inappropriate, in reality agent Aaron performed properly as an investigative agent of the government. We hold, therefore, that the District Court did not err in concluding that appellant was not prejudiced by the

government's improper characterization of agent Aaron as an agent before the first grand jury.[2]

Next, and for the first time on appeal, appellant argues that the grand jury secrecy rule was violated and that Tabor was improperly granted immunity. As the government correctly notes, "it is axiomatic that issues not presented to the trial court will not be considered on appeal." American General Finance Corp.

---

[2]Appellant argues that the government violated Fed. R. Crim. P. 6(d), the rule describing who may be present in grand jury proceedings, when agent Aaron was permitted to appear before the second grand jury in the absence of the United States Attorney. We are unable to find any support in the record for appellant's argument. Agent Aaron testified as a sworn witness under examination by the United States Attorney. See United States v. Echols, 542 F.2d 948, 952 (5th Cir. 1976), cert. denied, 431 U.S. 904 (1977). Based on a careful examination of the record, we hold, therefore, that appellant's argument that agent Aaron made an unauthorized appearance before the grand jury in the absence of the United States Attorney is without merit.

v. Parkway Bank & Trust Co., 520 F.2d 607, 608 (8th Cir. 1975). After careful examination of the record, we hold that appellant has failed to preserve these issues for review.

Finally, appellant argues that the District Court erred in denying appellant's motion in limine to suppress evidence of other financial transactions engaged in by appellant but not described in the indictment, arguing that the probative value of this evidence was outweighed by its prejudicial impact.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that his or her conduct on a particular occasion was in conformity with it. However, Fed. R. Evid. 404(b) permits the introduction of evidence of prior conduct that may constitute a separate crime to

prove motive, intent, opportunity, knowledge, preparation, common scheme or plan, identity, or absence of mistake or accident. United States v. Llach, 739 F.2d 1322, 1327-29 (8th Cir. 1984).

The requirements for the admission of other crimes evidence are well established:

> (1) the evidence of the other act must be relevant to a material issue; (2) the other act must be similar in kind and reasonably close in time to the crime charged; (3) the evidence of the other act must be clear and convincing; and (4) the probative value of the evidence must not be outweighed by its prejudice.

United States v. Miller, 725 F.2d 462, 466 (8th Cir. 1984) (citations omitted). The District Court has broad discretion in admitting evidence of prior conduct and its discretion should not be overturned absent a clear showing of abuse of discretion. See, e.g., United States v. Evans, 697 F.2d 240, 247-48 (8th Cir.), cert. denied, 460 U.S. 1086 (1982).

In the present case Tabor testified about various loans initiated by appellant from 1976 through 1980. The government offered this evidence to show common scheme and design and intent under Fed. R. Evid. 404(b). After reviewing the government's offer of proof, the District Court admitted the evidence of the earlier loans. The District Court found that the evidence of the other loan transactions was admissible in order to enable the jury to place the events in their proper context and to understand the overall scheme. The District Court also found that the evidence was clear and convincing and that its probative value outweighed any prejudicial impact.[3]

---

[3]Furthermore, the District Court stated that it would be willing to give a cautionary instruction concerning the limited purpose for which this evidence was admitted, but such an instruction was never requested by appellant.

We hold, therefore, that the District Court did not abuse its discretion in admitting the evidence of the other loans.

Alternatively, appellant argues that the District Court erred in refusing to grant him a continuance to further investigate the other bad acts because appellant only discovered that the government intended to use this evidence the weekend before the trial was scheduled to commence. We agree with the government that the District Court did not abuse its discretion in refusing to grant a continuance. Appellant does not claim that this evidence was exculpatory and therefore there is no authority that would have required the government to reveal the substance of Tabor's proposed testimony. Furthermore, appellant had ample time to prepare his defense adequately. Appellant was arraigned in

early March 1984 and trial was set to begin at the end of April 1984. Upon a previous motion for a continuance made by appellant, commencement of trial was postponed until July 9, 1984.

We have carefully considered appellant's other arguments and after a thorough examination of the record, we hold that they are without merit. Accordingly, the judgment of the District Court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF

APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

UNITED STATES OF AMERICA) No. 84-30002-01
)
v.)
)
C. L. CARR)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: 9-27-84.

WITH COUNSEL: Steve Adams and Ken Mourton

GUILTY, and the court being satisfied that there is a factual basis for the plea,

There being a finding/verdict of GUILTY.

Defendant has been convicted as charged of the offense(s) of Counts III and IV: Bank Embezzlement in violation of 18 U.S.C. 656.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court the court adjudged the defendant guilty as charged and convicted and ordered that the defendant hereby be committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of three (3) months and fined the sum of $1,000 on Count III of the indictment. Imposition of sentence on Count IV of the indictment is hereby suspended and the denfendant is placed on probation for a period of two (2) years upon the regular terms and conditions of probation. Such period of probation to be consecutive to the term of imprisonment imposed on Count III. The defendant is ordered to stand committed

until the fine is paid or he is otherwise discharged by due course of law.

Counts I and II of the indictment are hereby dismissed.

The court orders commitment to the custody of the Attorney General and recommends, It is further ordered that the defendant surrender himself to the institution designated no later than October 12, 1984, at 2:00 p.m.

SIGNED BY U. S. District Judge

H. Franklin Waters Date 9/27/84

Filed Oct. 10, 1984

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

UNITED STATES OF AMERICA) No. 84-30002-01
)
v.)
)
C. L. CARR)

ORDER FOR STAY OF SENTENCE

Now on this _____ day of October, 1984, upon consideration of defendant, C. L. Carr's, Petition for Stay of Sentence, the Court finds that said Petition should be granted for the following reasons:

1. Defendant duly filed with the Clerk of this Court a Notice of Appeal in regard to the issues in this case on October 4, 1984.

2. Defendant's appeal is not frivolous nor has it been filed merely for delay.

3. The attorneys for the government have no objections to the stay of

defendant's sentence pending the outsome of his appeal to the United States Court of Appeals for the Eighth Circuit.

Accordingly, defendant's sentence is hereby stayed until such time that his appeal to the United States Court of Appeals for the Eighth Circuit is heard and a mandate has been issued.

IT IS SO ORDERED.

_____
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
JUDGMENT

No. 84-2314-WA September Term, 1984

UNITED STATES OF AMERICA,	)	Appeal from
	)	the United
Appellee,	)	States
	)	District
v.	)	Court for
	)	the Western
C. L. CARR,	)	District of
	)	Arkansas
Appellant	)	

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is ordered and adjudged that the judgment of the said District Court is hereby affirmed in accordance with the opinion of this Court.

June 7, 1985

A true copy.
ATTEST: Robert D. St. Vrain
Clerk, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT 7/12/85

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2314-WA September Term, 1984

UNITED STATES OF AMERICA,	)	Appeal from
	)	the United
Appellee,	)	States
	)	District
v.	)	Court for
	)	the Western
C. L. CARR,	)	District of
	)	Arkansas
Appellant	)	

Appellant's petition for rehearing has been considered by the Court and is hereby denied.

July 2, 1985



F. R. Crim. P. 6

RULE 6. The Grand Jury

(a) Summoning Grand Juries. The Court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(b) Objections to Grand Jury and to Grand Jurors.

(1) Challenges. The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified.

Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. §1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) Foreman and Deputy Foreman. The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(d) Who shall be present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be

present while the grand jury is in session, but no other person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of the proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror may be made to --

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by the attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed with the names of

the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made:

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(iii) when the disclosure is made by an attorney for the government to another federal grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such

manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petition is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding of disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the

matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure in proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the

indictment except when necessary for the issuance and execution of a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

(F) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be

returned by the grand jury to a federal magistrate in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreman shall so report to a federal magistrate in writing forthwith.

(g) Discharge and Excuse. A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

No. 85-728

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

C.L. CARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the prosecutor's designation of an FBI agent as an "agent" of the grand jury is an error that requires dismissal of the indictment and reversal of his convictions even in the absence of any prejudice.

1. Following a jury trial in the United States District Court for the Western District of Arkansas, petitioner was convicted on two counts of aiding and abetting the willful misapplication of bank funds, in violation of 18 U.S.C. 656 and 2. He was sentenced to three months' imprisonment, fined $1,000, and placed on two years' probation (Pet. App. A17-A19). The court of appeals affirmed (*id.* at A1-A16).

The evidence at trial is outlined in the opinion of the court of appeals (Pet. App. A3-A4). In brief, petitioner, an automobile dealer and real estate investor, engaged in a scheme to deprive the First National Bank of Harrison, Arkansas

(the Bank), of its proper collateral on auto loans that subsequently went into default and to arrange fictitious sales of real property on which the Bank made loans that were in fact given to petitioner. Joel Tabor, an officer of the Bank, was involved in the scheme and received kickbacks for approving some of these transactions.

2. Tabor was indicted and convicted of embezzlement. Thereafter, he testified under a grant of immunity before a federal grand jury (the 1983 grand jury). After Tabor's initial appearance, the prosecutor made the following statement (Pet. App. A4, A5 (brackets in original)):

> Let me explain to you in front of the grand jury, . . . obviously we cannot cover in sufficient detail on these loans to enable us to do a proper investigation. I'm going to ask the grand jury to appoint Gary Aaron, a special agent of the FBI, as an agent of the grand jury, to continue . . . questioning you [Tabor] from time to time, as an agent of the grand jury and to report back . . . . [T]his information that you supply through Mr. Aaron will be included in the grant of immunity that has already been afforded to you.

The 1983 grand jury took no further action and its term expired before the investigation was completed (*ibid.*).

A new grand jury was empanelled in February 1984 (the 1984 grand jury). Evidence before the 1983 grand jury, including Tabor's testimony, was read to the 1984 grand jury. In addition, FBI Agent Gary Aaron testified before the new grand jury concerning his interviews with Tabor; Aaron appeared as a witness and was neither designated nor sworn as an agent of the grand jury. The 1984 grand jury subsequently indicted petitioner on the charges for which he was convicted at trial. Pet. App. A5-A6, A9-A10.

3. Petitioner contends that the prosecutor's designation of FBI Agent Aaron as an "agent" of the 1983 grand jury was error and requires the automatic dismissal of the indictment and reversal of his convictions even in the absence of any actual prejudice. For the reasons stated in our brief in opposition in *Jones* v. *United States*, cert. denied, No. 85-398 (Dec. 2, 1985), in which the same question was presented, petitioner's argument is without merit and does not warrant further review. See also *Griffith* v. *United States*, cert. denied, No. 84-6876 (Oct. 7, 1985); *United States* v. *Anderson*, No. 83-2519 (10th Cir. Dec. 6, 1985), slip op. 8 ("Fed. R. Crim. P. 6 contemplates the use of government agents * * * to assist an attorney for the government in his handling of a grand jury investigation"), rev'g 577 F. Supp. 223 (D. Wyo. 1983).[1] The Court denied certiorari in *Jones*, and there is no reason for a different result here.[2]

Petitioner does not claim that he suffered actual prejudice as a result of the error he asserts. On the contrary, as both the district court and the court of appeals found (see Pet. App. A8), it is clear that there was no prejudice in this case. In fact, the designation of FBI Agent Aaron as an "agent" of the grand jury occurred not before the 1984 grand jury that indicted petitioner but before the predecessor 1983 grand jury. And petitioner does not dispute that under *Costello* v. *United States*, 350 U.S. 359 (1956),

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[1]We are sending copies of our briefs in opposition in *Jones* and *Griffith* to counsel for petitioner.

[2]Indeed, because petitioner did not raise his challenge to the grand jury prior to trial (see Pet. 5), we believe that it was waived. See Fed. R. Crim. P. 12(b)(2) and (f).

Aaron could properly present hearsay evidence to the grand jury of Tabor's statements to him concerning petitioner's role in the embezzlement scheme.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1986

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[3]As in *Jones* and *Griffith*, it is unnecessary for the Court to hold this petition pending its decision in *United States* v. *Mechanik*, cert. granted, No. 84-1640 (argued Dec. 2, 1985). *Mechanik* presents the question whether a violation of Fed. R. Crim. P. 6(d) may be grounds for dismissal of an indictment in the absence of prejudice. The court of appeals in that case relied heavily on the language and purpose of Rule 6(d), which limits who may be present before the grand jury, in fashioning its rule of per se dismissal (see 735 F.2d 136, 139 (4th Cir. 1984)). Whatever the merits of the court's reasoning with respect to Rule 6(d), it has no application here, where there has been no violation of that Rule. As the cases cited in our brief in opposition in *Jones* make clear, the general principle is that prejudice must be shown to warrant dismissal of the indictment. *Mechanik* presents the question whether violations of Rule 6(d) should be treated as an exception to that principle.